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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

STATE OF ARIZONA, COUNTY OF YAVAPAI

STATE OF ARIZONA, Plaintiff, vs. **JAMES ARTHUR RAY,** Defendant.	Cause no. V1300CR201080049 Division PTB **STATE'S REPLY RE: MOTION IN LIMINE PERTAINING TO EXPERT RICK ROSS**

The State of Arizona, by and through undersigned counsel, replies to defendant's response to the State's Motion *in Limine* re Expert Rick Ross. For the reasons set forth in the following Memorandum of Points and Authorities, the Court should grant the State's motion *in limine*.

MEMORANDUM OF POINTS AND AUTHORITIES

A. Defendant's Right of Confrontation is not Limitless

Defendant incorrectly argues that his right to confront witnesses permits him to examine an expert witness on any subject or topic the defendant deems appropriate. This position apparently seeks to abrogate the Rules of Evidence, and would stretch a defendant's right to confront witnesses far beyond what is permitted. "A defendant's right to present relevant evidence is not unlimited, but rather is subject to reasonable restrictions" including application of reasonable evidentiary rules. *United States v. Scheffer,* 523 U.S. 303, 308, 118 S.Ct. 1261, 1264 140 L.Ed.2d 413 (1998).

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Addressing the defendant's right to confront a State's witness, Arizona's Supreme Court determined that the trial court appropriately denied a defendant's request to cross examine a state's witness about the possibility of a prior juvenile conviction when doing so would have amounted to nothing other than **a general attack on the witness' character**. *State v. McKinney*, 185 Ariz. 567, 574, 917 P.2d 1214, 1221 (*en banc* 1996), certiorari denied 117 S.Ct. 310, 519 U.S. 934, 136 L.Ed.2d 226, motion to recall mandate denied, denial of post-conviction relief affirmed 204 Ariz. 386, 64 P.3d 828, reconsideration denied, certiorari dismissed 124 S.Ct. 44, 539 U.S. 986, 156 L.Ed.2d 702.

"While wide latitude is to be allowed in cross-examination, **the inquiry must be relevant**." *State v. Schrock,* 149 Ariz. 433, 438, 719 P.2d 1049, 1054 (1986) (emphasis added). A prosecution witness may be cross-examined by the defendant to demonstrate possible **bias, prejudice, or ulterior motives** of the witness. *Davis v. Alaska*, 415 U.S. 308, 320 (1974). "Bias" is a catchall term describing attitudes, feelings, or emotions of a witness that might affect her testimony, leading him to be more or less favorable to the position of a party for reasons other than the merits. Christopher B. Mueller & Laird C. Kirkpatrick, *Federal Evidence* § 307 at 389 (2d ed. 1994). **Not everything tends to show bias, and courts may exclude evidence that is only marginally useful for showing bias**. *Mueller & Kirkpatrick, supra,* § 268 at 188-89. The evidence must not be so attenuated as to be unconvincing because then the evidence is prejudicial. *Id.*

The test for the denial of the right to cross-examination is whether the defendant has been denied the opportunity of presenting to the trier of fact information which bears either on the issues in the case or on the credibility of the witness. *State v. Conroy*, 131 Ariz. 528, 531, 642 P.2d 873, 876 (Ariz. Ct. App. 1982); accord *State v. Fleming*, 117 Ariz. 122, 571 P.2d 268 (*en banc* 1977).

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Addressing the confrontation issue, Arizona's Supreme Court held that "a trial judge "retain[s] wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on [ ] cross-examination based on concerns about, among other things, **harassment, prejudice, confusion of the issues,** the witness' safety, or interrogation that is repetitive or **only marginally relevant"** *State v. Canez*, 202 Ariz. 133 at 153, ¶ 62, 42 P.3d 564, 584 (2002), *supplemented*, 205 Ariz. 620, 74 P.3d 932 (2003); *accord Delaware v. Van Arsdall,* 475 U.S. 673, 679, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986).

In an earlier *en banc* opinion later cited with approval by *Cañez,* the Arizona Supreme Court held that:

> **The right of confrontation does not confer, however, a license to run at large in cross-examination**. The right to cross-examination must be kept within "reasonable" bounds and the trial court has discretion to curtail its scope. Distinctions between reasonable limitations on the scope of cross-examination and unnecessary restrictions on the right to confront witnesses are, however, difficult to draw and must be considered on a case-by-case basis. The test is whether the defendant has been denied the opportunity of presenting to the trier of fact information which bears either on the issues in the case or on the credibility of the witness. **As evidence of the witness' condition becomes more remote in time, it has proportionately less bearing on the credibility of the witness**.

State v. Fleming, 117 Ariz. 122, 125-126, 571 P.2d 268, 271-272 (*en banc* 1977) (emphasis added); *accord United States v. Lyons*, 403 F.3d 1248, 1255 (11th Cir. 2005) ("The Sixth Amendment only protects cross-examination *that is relevant*... Thus a trial court retains "wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination...").

When evaluating whether to admit a prior conviction of a prosecution witness, the major concerns are to protect the witness from being harassed and unduly embarrassed, the jury from being confused and misled, and everyone involved (court, jury, parties) from having to endure an unnecessarily prolonged trial. *Mueller & Kirkpatrick, supra,* § 265 at 173.

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Defendant's response failed to demonstrate how a thirty-five year old felony conviction pertains to a material issue or how the conviction relates to Mr. Ross' credibility, bias, prejudice, or ulterior motive. Indeed, Rule 609's presumptive ten year limitation on the use of old felony convictions, and the holding in *Fleming,* recognizes the fact that the passage of time diminishes the relevancy of an old felony conviction on the issue of credibility. Moreover, any probative value of the thirty-five year old conviction is clearly outweighed by its prejudicial effect. Rule 403, Ariz.R.Evid.

Defendant also fails to demonstrate how Mr. Ross' rare and occasional conduct, **over twenty years ago**, involving the forcible deprogramming of adult cult members at the request of the person's parents, is somehow relevant to his bias, motivation, or prejudices. Mr. Ross will not be called to testify about cults, nor will his testimony concern cult deprogramming methods. To allow the defense to examine Mr. Ross about incidents from twenty years ago that have no relevancy to the issues in the current case would lead to precisely the types of **harassment, confusion of the issues and examination on only marginally relevant topics** that *Canez* prohibits. Defendant's request to examine Mr. Ross on twenty or more year old acts unrelated to the present case would constitute precisely the sort of **general attack on the witness' character** prohibited by *McKinney.*

Any probative value of the twenty year old conduct is clearly outweighed by its prejudicial effect. Rule 403, Ariz.R.Evid. The twenty year old conduct is precisely the sort of other act evidence specifically prohibited by Rule 404(b).

B. Mr. Ross' Prior Conviction Should Be Precluded Under Rule 609

1. <u>The conviction is too old to be probative</u>

Defendant next argues that Mr. Ross' thirty-five year old conviction, which defendant incorrectly labels as an embezzlement conviction, involves a crime of dishonesty and therefore

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remains relevant.[1] In fact, the felony conviction was for Conspiracy in the Second Degree to Commit Grand Theft. There are currently seven subsections to the theft statute, specifying various ways that theft can be committed. Some involve dishonesty or false statement, and some do not. Defendant has failed to establish under which subsection of the 1975 criminal statute Mr. Ross was convicted, and has failed to establish that the violated subsection contained elements involving dishonesty or false statement.

Arizona's Supreme Court has opined that while theft appears to carry a connotation of dishonesty, an analysis under Rule 609 is instead concerned with whether the crime established the trait of untruthfulness *State v. Malloy*, 131 Ariz. 125, 127, 639 P.2d 315, 317 (*en banc* 1981). *Malloy* held that with respect to Rule 609, the phrase "dishonesty or false statement" **should be construed narrowly** to include only those crimes involving some element of **deceit, untruthfulness, or falsification**. *Id.*

Assuming, *arguendo,* the conviction was for a crime involving dishonesty, the fact that it was committed twenty five years **after** Rule 609's presumptive ten year time limit had expired, clearly demonstrates it is no longer relevant. This is particularly true in light of the fact that Mr. Ross was only twenty one when the offense was committed, was never imprisoned for the crime, had the conviction set aside in 1983, and in light of the amazing turn around in Mr. Ross' life discussed in the State's motion *in limine*. *See State v. Fleming*, 117 Ariz. 122, 125-126, 571 P.2d 268, 271-272 (*en banc* 1977) ("As evidence of the witness' condition becomes more remote in time, it has proportionately less bearing on the credibility of the witness"); and see *State v. Henderson*, 116 Ariz. 310, 316, 569 P.2d 252, 258 (Ariz. Ct. App. 1977) ("The determination as to whether or not a prior conviction can be used for impeachment purposes calls for the exercise

[1] Mr. Ross openly discusses the Conspiracy in the Second Degree to Commit Grand Theft conviction on his website, and admits it involved embezzlement from a jewelry store where his friend worked. Although that may be

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of discretion. The general guidelines ... include age, character of the prior offense, the time of its commission, length of imprisonment, subsequent conduct and intervening circumstances").

2. Defendant failed to comply with Rule 609's notice requirement

Rule 609 provides that evidence of a conviction more than ten years old is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a **fair opportunity** to contest the use of such evidence. Here, defendant's notice was provided to the State less than two weeks prior to the start of trial. There is insufficient time for the state to acquire certified copies of the judgment in order to determine whether there are any irregularities or to determine which subsection of the theft statute Mr. Ross was convicted of conspiring to violate. There is insufficient time for the state to locate witnesses who can explain any extenuating or mitigating circumstances of the thirty-five year old conduct. There is insufficient time for the state to determine witness order or otherwise alter its trial strategy to deal with this issue.[2]

The footnote in defendant's response suggests defendant only recently learned about Mr. Ross' prior felony conviction. In fact, Mr. Ross' felony conviction was disclosed to defendant on 25 October 2010.[3] On 26 January 2011, defendant sent the State a letter inquiring whether any witnesses other than Mr. Ross (or Fawn Foster), had prior felony convictions. The State responded to that request on February 2nd (this is the communication referred to in defendant's footnote). Defendant's attempt to change history as to when it learned of Mr. Ross' felony conviction should not be countenanced.

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what Mr. Ross was charged with or even did, the relevant inquiry for 609 purposes is the elements of the crime he was convicted of in 1976, Conspiracy in the Second Degree to Commit Grand Theft,

[2] Defendant's claim that the State should not be surprised by defendant's untimely notice ignores the spirit and letter of Rule 609. Moreover, the State had no reason to believe defendant would actually seek to use a thirty-five year old felony conviction, particularly since defendant has never disclosed certified priors, or any other evidence that might indicate it intended to use the old conviction.

[3] See attached 10/25/2010 letter from Sheila Polk to Truc Do.

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C. Conclusion

The Court may place reasonable restrictions on a defendant's right to confront and cross-examine a State's witness, including requiring the examination to be relevant to the factual issues in the case or the witness' bias, prejudice, or ulterior motives. *Schrock,* 149 Ariz. at 438; *Davis,* 415 U.S. at 320. Evidence which might otherwise be relevant to determining bias can become attenuated and irrelevant due to the passage of time. *Mueller & Kirkpatrick,* § 268 at 188-89; *Fleming*, 117 Ariz. at 125-126. The trial court should impose restrictions on the defendant's cross-examination to avoid harassment, prejudice, confusion of the issues, or interrogation that is only marginally relevant. *Canez*, 202 Ariz. at 153, ¶ 62.

Evidence of Mr. Ross' thirty-five year old felony conviction is not relevant, does not point to any bias, and is outweighed by its prejudicial effect. Likewise, in a case where Mr. Ross will be called as an expert solely on the topic of LGAT, evidence of Mr. Ross's unrelated cult deprogramming practices from twenty or more years ago, is also not relevant, would confuse the jury as to the issues, and would be severely prejudicial to the State.

Moreover, defendant has failed to establish the conviction was for a crime involving deceit, untruthfulness, or falsification. Even assuming the conviction did involve dishonesty, all of the factors enumerated in *Henderson* point towards precluding the conviction. 116 Ariz. At 316.

Finally, defendant failed to provide the State with Rule 609's mandatory advance notice of his intent to utilize Mr. Ross' thirty-five year old conviction. The State has been prejudiced by the lack of notice.

Accordingly, for all of the foregoing reasons, the Court should preclude defendant from attempting to introduce evidence of Mr. Ross' felony conviction, or of Mr. Ross's practices from twenty years ago regarding cult deprogramming.

Dated this 10th day of February, 2011.

Sheila Sullivan Polk
YAVAPAI COUNTY ATTORNEY

By: _____
Bill R. Hughes
Deputy County Attorney

COPIES of the foregoing emailed this 10th day of February, 2011:

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By: Kathy Durrer

COPIES of the foregoing delivered this 10th day of February, 2011, to

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SHEILA POLK
Yavapai County Attorney

VIA EMAIL & US MAIL

October 25, 2010

Truc T. Do
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Re: State v. James Arthur Ray, CR 201080049

Dear Ms. Do:

In accordance with Rule 15.1(d)(1), the following information is disclosed relating to expert witness Rick Ross:

On April 2, 1976, Ricky Allan Ross was convicted of Conspiracy, Second Degree, to Commit Grand Theft, a felony, in Maricopa County Superior Court Cause No. CR89445.

On June 7, 1983, the Maricopa County Superior Court granted Mr. Ross' Application for Restoration of Civil Rights and vacated the judgment of guilt and dismissed the charges against him.

Very truly yours,

Sheila S Polk

Sheila Sullivan Polk
Yavapai County Attorney